



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3316 OF 2003

IN THE MATTER OF THE ESTATE OF LAURENT MUITIRIRI NJOROGI (DECEASED)

JUDGMENT

1. The application for determination is a Summons dated 10th February 2015, filed herein on 13th February 2015. It is brought at the instance of James Njuguna Kimani. He seeks revocation or annulment of the certificate of confirmation of grant issued herein on 1st December 2014. He also seeks orders specific to Kabazi/Munanda Block 2/894, 895 and 896, for restraining orders and for cancellation of certain entries.
2. The applicant deposes in his affidavit in support to having a beneficial interest in the subject property on the grounds that he had purchased the same from the deceased prior to his demise. The alleged purchase was in 2001. He allegedly paid a total of Kshs. 600, 000.00 for the three parcels, and has been in possession since then. He has attached several documents to his affidavit in support of the contention that he bought the property and paid for it in full. There is also another affidavit in support sworn by David Mwaura Waigiri, an alleged uncle of the applicant, who alleges to have been privy to the sales and who purportedly paid some of the purchase moneys on behalf of the applicant. He has attached to that affidavit several documents where the deceased allegedly acknowledged receipt of the purchase money from the applicant.
3. The reply to the application is through the joint affidavit of the administrators, sworn on 8th July 2015. The deponents contest the allegation that the deceased had sold land to the applicant for, according to them, the deceased had never disclosed such a thing to them. They allege that the applicant is claiming inheritance through the back-door on account of his being a brother-in-law of the deceased, having married a sister of the deceased. They aver that the documents put in evidence to support the applicant's contention do not refer to the property in question in material particulars. They also contest the alleged fact of occupation of the subject property by the applicant. They assert that if there were any developments on the subject property the same must have been done without their knowledge and consent.
4. Directions on the disposal of the application were given on 28th April 2015. The same as to be heard orally. The hearing was conducted on 26th October 2015. The respondents though served did not attend court, and the matter therefore proceeded *ex parte*. The applicant testified and gave vent to the averments made in his affidavit in support of the application. He also called a witness who testified that he was privy to the transactions in question. At the conclusion of the proceedings, I directed the parties to put in written submissions. The applicant complied with those directions and filed his written submissions, and a copy of a decision that he relied on. The respondents did not file written submissions. I have read through the applicant's submission and noted the arguments made therein.
5. The application before me is premised on section 76 of the Law of Succession Act, Cap 160, Laws of

Kenya, which provides for revocation of grants of representation. However, the applicant does not pray in his application for revocation of the grant itself, but for annulment or revocation of the confirmation of the grant. I have carefully read through the provision in section 76 of the Act. My impression of it is that the same provides for revocation of the grants themselves and not the certificates issued upon the confirmation of the said grants. It is about the process of obtaining the grants and the administration of the estate. There is nothing in those provisions that allows for the setting aside or annulment or revocation of orders made by the court confirming the grant. Any party unhappy with the confirmation order is at liberty to apply for the review of those orders as the review of orders and decrees is one of the reliefs introduced into the probate process by Rule 63 of the Probate and Administration Rules.

6. The contest between the applicant and the administrators is on whether the applicant had acquired an interest in the estate's property through sales that were allegedly carried out by the deceased during his lifetime. Does this court have jurisdiction to make a determination on the question as to whether the deceased sold the said assets to the applicant, and also whether the applicant had acquired an interest in the assets which ought to be honoured by the administrators?

7. It would appear that the Constitution 2010 has stripped the High Court of jurisdiction to make determinations on question touching on 'the use and occupation of, and title to, land.' That jurisdiction has been conferred on the Environment and Land Court. The relevant constitutional provisions are Articles 162(2) and 165(5), which provide as follows:

'162 (2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

a. ...

b. the environment and the use and occupation of, and title to, land.'

165 (5). The High Court shall not have jurisdiction in respect of matters –

a. ...

b. falling within the jurisdiction of the courts contemplated in Article 162(2).'

8. Clearly, my hands are tied. I have no jurisdiction to determine whether the deceased had sold the assets in question to the applicant. I cannot therefore decide whether the applicant has an interest in the assets in question, to facilitate his being given a share in the estate. These are matters that can only be determined by the Environment and Land Court. The applicant ought to move that court appropriately. It is only after he is successful there that this court can hear his plea to have the distribution herein altered to accommodate his interests. The orders to restrain the administrators and to cancel entries in the relevant land registers can only be obtained from the Environment and Land Court.

9. From the material before me it would appear that the applicant does have an arguable case. To do justice in the circumstances, it may be necessary for the property in question to be preserved pending the filing and determination of a suit by the applicant at the Environment and Land Court. The said preservation is envisaged by Rule 41(3) of the Probate and Administration Rules, where assets whose ownership is contested is set aside by way of being removed from the distribution schedule to await determination of title in separate proceedings. In the circumstances of this case, the prudent thing to do should be to review the distribution orders made 1st December 2004 so that Kabazi/Munanda Block 2/894, 895 and 896 are removed from the schedule of assets in the distribution schedule to await determination of the issue as to whether the same had been sold to the applicant by the deceased.

10. The final orders shall therefore be -

a. that the certificate of confirmation of grant dated 1st December 2004 shall be amended so as to delete Kabazi/Munanda Block 2/894, 895 and 896 from the distribution schedule;

b. that the applicant is hereby granted 366 days to obtain the relevant orders from the Environment and Land Court on Kabazi/Munanda Block 2/894, 895 and 896;

c. that in default of (b) above, the administrators shall be at liberty to move this court for the distribution of Kabazi/Munanda Block 2/894, 895 and 896; and

d. that there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE